88-1917

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NO_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOAN DANIELSON, Petitioner

v.

BANK OF AMERICA, NT & SA et al., Respondents

PETITION FOR A WRIT OF CERTIORARI
To The
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

JOAN DANIELSON
900 Chestnut Street #210
San Francisco, CA 94109
(415) 775-7115

April 19, 1989

Petitioner in Pro Se

QUESTIONS PRESENTED

1. Does the probability of undue prejuduce increase the standard of impartiality required of the trial judge?

2. Are a litigant's 14th Amendment due process rights violated by actions of the trial judge?

3. Does injustice result when opinions not certified for publication are held to lesser standards?

4. Does nonpublication of opinions contribute to depriving litigants of a forum?

5. Must the person hired instead of or to replace plaintiff in a *prima facie* showing of discrimination under *McDonnell Douglas* be "as qualified" as plaintiff or merely qualified for the position?

LIST OF PARTIES

The parties in the proceedings below and before this Court are petitioner Joan Danielson and respondent Bank of America, NT & SA.

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PETITION FOR A WRIT OF CERTIORARI
To The
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FIRST APPELLATE DISTRICT, DIVISION TWO

The petitioner Joan Danielson respeect-fully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, Division Two, entered in the above-entiteld proceeding on November 3, 1988.

OPINIONS BELOW

The unpublished opinion of the Court of Appeal of the State of California, First

Appellate District, Division Two, is reprinted in the appendix hereto, p. 1a, infra.

JURISDICTION

Petitioner brought this suit for employment discrimination in the San Francisco Superior Court, then subsequently appealed to the Court of Appeal of the State of California, First Appellate District, Division Two. Following an adverse decision by that court a Petition for Review was filed with the California Supreme Court. Said petition was rejected on January 19, 1989.

The jurisdiction of this Court to review the judgment of the Court of Appeal is invoked under 28 U.S.C. §1257(3).

STATUTE INVOLVED

United States Constitution, Amendment XIV.

STATEMENT OF THE CASE

This action involves alleged discrimination and disparate treatment based on age (then 49) and sex. It was filed pursuant to the California Fair Employment Practices Act (California Labor Code §1410 et seq), Labor Code §1197.5 and the regulations of the Department of Fair Employment and Housing, §285.0 et seq.

Petitioner was hired by Bank of America March 28, 1978 as a "Tax Specialist". She resigned from another position in reliance on promises made by the Bank. She had an MBA in tax and prior experience in the job for which she was hired - preparation of expatriate tax returns - as well as several years' previous tax experience in other areas.

The section of the Bank's tax department into which petitioner was hired - International Services Section or ISS - had been

formed the previous year and all professional positions except for that of Gordon, the manager, were hourly. In its only written definition the Bank defined the hourly employee as one who worked less than ten hours a week, whose hours were not capable of being scheduled and who received a 10% pay premium in lieu of benefits. None of these criteria applied to ISS employees, who were required to work at least an 8-hour day at designated hours, commonly worked 50 or more hours a week and did not receive a pay premium.

At the time of hire petitioner was given the Employee Handbook and told by the personnel department that she would receive the 10% premium while hourly but would become permanent after a 90-day probation period. (The Employee Handbook confirms this probation period.) Upon completion of the 90 days she was given an employee benefits manual.

She was also asked to sign an Agreement of Employment which said in part

> "I understand that while I am hourly my employment can be terminated at any time without notice" [but not without cause].

The Employee Handbook (as well as the Standard Procedures Manual) set out the causes considered terminable offenses, including various criminal offenses, falsification of bank records and insubordination. It provided disciplinary procedures to be followed, including an unofficial warning then if warranted counseling, probationary suspension and termination if the offense were not remedied. These procedures were to be documented in the personnel file.

Petitioner was also given the Bank's Code of Corporate Conduct, which provided that employees were encouraged to discuss any differences of opinion with supervisors.

Petitioner was told by Gordon on hire the section was attempting to convert some of the hourly positions to salaried and

asked if she would like to be considered. Two months after hire seven hourly employees were made salaried. Six of them had been with the section the previous year. Performance evaluations showed continuous uninterrupted employment by the six employees since the previous spring. It was revealed at trial that all of the converted employees had taken personal time off during the year they were hourly for various lengths of time from a week to several months.

The position for which petitioner was hired involved handling of audits and various other related matters as well as tax compliance Expatriates are given an automatic two month extension and the Bank routinely applied for another six month extension of time to file, so that work was spread out fairly evenly during the year with seasonal humps during the late spring through August or September.

Two recent law school graduates were hired a couple of weeks after petitioner and were terminated in October or November

with the notation "temporary job completed", along with three other individuals who had worked since the previous year. The fact that petitioner was not terminated while employees hired before her were served as an independent indication of the permanence of the position.

The Bank throughout this case has tried to equate "hourly" with "temporary". They have been hindered by the fact that their only definition of hourly employees did not apply to ISS employees, that they had a group of hourly employees who had worked for several years and were entitled to vacation time and by the fact the whole section was hourly for some time.

Two additional salaried positions were filled during petitioner's employment. In August or September 1978 the Bank hired Robert Chinen, a young male with no prior employment with the Bank and no prior tax experience. The Bank was to claim in its Answer Chinen was hired because of his

estate tax experience; when it realized petitioner had a substantial estate tax background it amended this variously to claims of legal background (nonexistent) and employee benefits expertise (irrelevant). Two or three months after hire Chinen for absent for a month on account of illness.

Additionally, in February 1979 Rex Halverson, the only remaining hourly employee (hired a week before petitioner) was made salaried. When petitioner asked why Rex, a young male with no prior tax experience was promoted instead of her she was told it was because (1) he was an attorney and (2) she needed to socialize more in the section. It was never established whether Rex took the position recently vacated by Doreen (see next paragraph); one claim was made that he was an employee of the corporate tax department rather than ISS.

In January 1979 Doreen Blumenfeld, the only salaried female employee of ISS and the only female professional in the section be-

sides petitioner, was involuntarily separated. On advice of the Bank's employee assistance department Doreen had applied for a leave of absence while trying to relocate to another job within the bank because of apparent sexual discrimination in the section. On conclusion of her leave she was told there was no position available in the Bank for which she was qualified. (The Bank at that time had over 50,000 employees). They were to use the same "no positions available"claim as one of the theories under which petitioner was terminated, though Doreen was not allowed by the trial court to testify as to the manner of her termination.

In mid-March 1979 Bill Xenos, who had no prior tax experience, was hired at a salary higher than petitioner. The trial judge refused to admit into evidence a hiring committee notation that he lacked the ability to deal effectively with people.

In late March 1979 in a closed meeting with only Lane, an assistant manager, and

Fox, a coworker present, petitioner objected to a proposed change in the method of assigning reviewers. In addition to objecting to the method (which was abandoned within a few months) petitioner protested the fact that it would involve having her work reviewed by Rothschild whom she felt was incompetent for the job, citing previous experiences to support her objection. She made one reference to Rothschild as a "queer".

The Bank was to use this one reference (probably occasioned by illness which was to be diagnosed as an ovarian tumor) to support an otherwise nonexistent defense to a claim of discrimination and disparate treatment.

Lane testified he was extremely surprised by petitioner's use of the word, which he found completely atypical. He had never before heard her use derogatory language. Testimony at trial revealed evidence of improper language from several members of ISS including frequent off-color jokes by Fox

which resulted in his being counseled and isolated and Gordon's description of Kolling as a "fag". One of the Bank's witnesses testified at trial she had told petitioner to "fuck off" in response to petitioner's attempts to be friendly.

About a week after this meeting, on April 4, petitioner learned she would have to enter the hospital the following day for cancer surgery. She told Gordon, who advised her she would have to agree to work with Rothschild as a condition for her return. On April 5 petitioner told Gordon she would work with Rothschild and was told by Gordon her position would be held for her unless a more qualified applicant were found.

On April 20 petitioner phoned Lane and told him in Gordon's absence she would return April 25. In a second phone call on April 24 she was told by Gordon that three young men had been hired the previous week, that there were no positions available and she therefore had no job.

She made several attempts to obtain reinstatement into her position through the Employee Assistance Department of the Bank, culminating in a meeting on September 6 with Gordon and Kay Nelson and Jennifer Renzel (the latter VP for Personnel).

The Bank's position regarding reason for termination is completely inconsistent. Testimony at trial included the following: (a) Use of the word "queer"; (b) insubordination (by insubordination Gordon meant the initial refusal to work for Rothschild); (c) the men hired during my absence were more qualified because petitioner was completely unqualified by insubordination; (d) it was the middle of tax season (the fact that most returns were on extension was not addresssd); (e) there were no positions available (the Bank's continued recruitment of employees was not addressed).

Nor was there any agreement as to whether petitioner had been terminated or quit voluntarily. There was testimony variously that:

(a) There was no "reinstatement" of hourly employees, only termination and rehire. Thus when an hourly left for however short a time an application for reemployment must be submitted. (b) There was no leave of absence for hourlies. Production of the bank's written policy providing for hourly leaves belied this contention. (c) Gordon testified he had intended to fire me for insubordination after my initial refusal to work for Rothschild but decided it would be inhumane to do so before hospitalization. He said he did not expect me to reapply and did not think my promise to do as he asked was sincere. (d) Gordon later testified he did not make a final employment decision until the meeting with Employee Assistance five months later.

Lane testified he thought I had been fired.

Renzel agreed I had approached Employee Assistance for reconsideration of termination and was seeking reinstatement or rehire. She said the final decision was her depart-

ment's and she decided on the basis of the September meeting not to reverse Gordon's earlier decision.

Judge Ira Brown, pursuant to a motion for summary judgment or in the alternative for findings of fact, made two findings which are pertinent here.

> "#32. Because of plaintiff's serious medical condition Mr. Gordon decided he should not fire plaintiff for her act of insubordination. (Gordon deposition 119:16-25; Lane deposition 68:7-13)."

This finding shows conclusively that Gordon intended to fire petitioner in April.

A second finding, much relied upon by the Bank, follows:

> "15. Bank policy provides that hourly employees are not entitled to paid vacation time or medical leaves of absence with a guaranteed right to return to work."

The Bank used this finding to try to exclude testimony at trial of evidence of petitioner's right to entitlement to time off for medical reasons. The trial judge repeatedly refused to allow introduction of evidence showing

that petitioner was denied this right under bank policies though she was able to show disparate treatment in the time off given to others. She was also able to produce proof that the Bank did have a leave of absence policy for hourly employees, despite contrary testimony of the Bank's witnesses.

The trial court also improperly instructed the jury to disregard the testimony of Doreen Blumenfeld regarding discrimination. Pursuant to an in limine motion the court had ruled she could not testify regarding her termination or lawsuit. During direct examination she told of plaintiff's competence and lack of interpersonal problems, of the fraternity-like atmosphere in the section and the discriminatory treatment she had experienced.

On cross-examination the Bank's attorney repeatedly referred to Doreen's deposition testimony. Since he was apparently

trying to find a discrepancy Doreen said near the beginning of cross-examination that she had not read the deposition since she had settled her lawsuit several years before. There was no objection by the court or defendant's counsel and the court allowed cross-examination based almost wholely on deposition testimony in her own lawsuit to continue for several hours. At the conclusion, in response to an implication by the Bank's attorney that she had been well treated, Doreen said she had been fired. It was not until well over a week later that the court instructed the jury to disregard all of Doreen's testimony regarding discrimination and her lawsuit.

Since reference to the suit had been made at the start of cross-examination and questions on discriminatory treatment continued throughout there seems no reasonable basis for this ruling, which went far beyond the stated intention of the court and deprived petitioner of supportive testimony.

Refusal to allow Doreen to testify as to the manner of her termination deprived petitioner of the chance to show pattern and practice, an indication of discrimination.

The Bank attempted to show that petitioner could not have relied, as she claimed, on the Employee Handbook, through testimony that the book was not issued until a few weeks before she left the Bank. When the custodian of records made this statement petitioner's attorney objected under the Best Evidence Rule, asking that the Bank put into evidence any document which showed when the handbook was first distributed. The court overruled the objection. No claim was made that such a document did not exist and no justification was given for the court's refusal to order its production. Instead the court lent credence to the custdoian's unsupported testimony by saying:

> " . . . we are just confusing it. If we let the witness's direct stand, it would be very clear."

The court later reversed itself and ad-

mitted the book outside the jury's presence and without their knowledge just prior to instructing them.

The court also refused to admit the Standard Procedures Manual (SPM) which, along with the Employee Handbook, contained most of the promises made to employees, thereby excluding the principal written evidence of the Bank's contractual obligation.

Respondent urged its exclusion at least a dozen times in the jury's presence on the basis that portions of it did not apply to hourly employees. No such argument was made concerning the Employee Benefits Manual, Code of Corporate Conduct or Employment Guide, all of which contained material inapplicable to hourlies, and all of which were admitted.

Discrimination

The criteria for determining discrimination in employment cases have been developed under McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S.Ct. 1817 (1973) and cases following it. These criteria have been summarized in Mixon v. Fair Employment & Housing Com., 192 Cal.App.3d 1319, 237 Cal.Rptr. 884 (1987), which notes that California courts have relied upon federal law to interpret analogous provisions of the state statute.

1) Complainant must establish a prima facie case of discrimination; he can do this by showing (i) he belongs to a protected group; (ii) he applied and was qualified for a job for which the employer was seeking applicants; (iii) despite his qualifications, he was rejected; and (iv) after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's

qualifications.

2) The employer must offer a legitimate reason for his actions.

3) The complainant must prove that this reason was a pretext to mask an illegal motive. He can do this either by persuading the court that a discriminatory reason more likely motivated the employer or by showing that the proffered reason is not the true one.

Mixon notes that the McDonnell criteria have been adapted to and applied in a variety of contexts.

The Issues Here

There are three main areas in which petitioner's rights have been violated under the McDonnell test.

1. At stage 2 the reason given by the Bank in its Reply Brief for terminating petitioner was the lack of positions. However little testimony was offered in support of this. Instead the Bank offered a great deal of prejudicial testimony questioning

petitioner's mental stability.

2. Burdine v. Texas Department of Com. Affairs (1981), 450 U. S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 provides that the defendant must

> " . . . frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." (pp. 255-256) (Emphasis added).

Here not only was the plaintiff given an assortment of reasons from which to choose and therefore no fair chance to demonstrate pretext, but the trial judge frustrated her attempts to do so. This was done by refusing to honor the best evidence rule, disallowing rebuttal testimony, refusing jury instructions which would clarify the existence of a contract and covenant of good faith, refusing to admit bank manual and handbook, and a variety of other means. (See Appendix B)

3. When the jury asked what must be shown to prove discrimination the judge gave a completely misleading instruction based on McDonnell. See discussion at page 42, et seq.

Where Issues Were Raised

The federal question of violation of due process was raised as follows:

1. In the trial court by repeated objections to trial court rulings, in side bar conferences and in open court. The cumulative effect of these rulings, resulting in violation of due process rights was not fully apparent until the conclusion of trial.

2. In appellant's opening brief, where appellant acted pro se. In addition to recitation of specific errors plaintiff claimed that "the trial court did not properly fulfill its obligation to leave determination of the facts to the jury or to instruct them on the law."

3. In petition to the California Supreme Court reference was made to the notation above, identifying it as an objection based on due process. In addition there were several pages analyzing the issues presented and why I felt the Appellate Court had erred

in the manner of addressing them or failure to do so. A copy is attached as Appendix B.

Objections to the hearsay testimony of Dr. Carson and prejudicial testimony of Employee Relations were first made in limine motions in the trial court. The claim that they violated my right to a fair trial was first made in appellant's opening brief.

The appellate court ruled that their probative value outweighed their prejudice.

Objection to the McDonnell Douglas instruction was made at trial. The appellate court's opinion states it is a true statement of the law and not erroneous.

The prejudice caused by the unpublished opinion has not been directly addressed previously, since I was not aware until after receiving the opinion it was not to be published. The petition to the California Supreme Court, however, set out fully the particulars in which I felt the opinion had failed to address the issues or had erred.

Specific reference was made to Article VI, §14 of the California Constitution which provides that reasons be given. I added:

> "I believe that failure to address many material issues of the case and the apparent disregard of legal principles in others by the appellate court deprives appellant of this constitutional right and that this deprivation falls under a violation of due process rights."

The question of forum was effectively raised in the petition to the Supreme Court with the above recital of the appellate court's failure to address issues.

The California Supreme Court, by failing to review the case, did not respond to the issues raised.

The petition elsewhere referred to violation of due process rights under Federal and state constitutions.

REASONS FOR GRANTING CERTIORARI

In General

The decision is not based on adequate state grounds

Where founded in state law the holdings are contradictory and would not support a decision.

The state court adopted federal statutory law on a controlling issue

The California court adopted the federal precedent of the cases under McDonnell Douglas v. Green, supra, as the applicable law. Of particular importance is a jury instruction purporting to define discrimination based on what I believe is an incorrect interpretation of the McDonnell cases. The District Court of Appeal defended its use as being consistent with federal law. Federal law therefore clearly controls a determination of the issue of discrimination.

> A case which is likely to be decided by prejudice and emotional reaction on the part of the jury must be accorded at least the standard of judicial impartiality to which it is entitled, or an even higher standard, to assure that due process rights to a fair trial are protected.

San Francisco is a city whose politics are closely alinged with the gay community. Political candidates actively seek the endorsement of gay rights groups. The president of our Board of Supervisors, Harry Britt, is an avowed homosexual.

About six months prior to the events which prompted this lawsuit Harvey Milk, the first professed gay in the United States to hold public office had been murdered, along with mayor George Moscone. Jim Jones, who was reputed to endorse homosexuality among his followers (1), was San Francisco's Director of Public Housing before moving to Guyana. (The Jonestown

(1) San Francisco Examiner, Image Magazine November 6, 1988, "The ten days that shook San Francisco", page 10.

tragedy occurred a week before the City Hall murders.)

In this atmosphere the trial judge not only refused to enforce the rights to which petitioner was entitled by rejecting the best evidence rule, allowing the introduction of hearsay-testimony of no probative value and refusing rebuttal testimony, but in place of any legitimate defense to its actions required by stage 2 of the McDonnell Douglas cases, supra, allowed prejudicial testimony aimed at an issue guaranteed to generate strong emotional reaction on the part of the jury.

Though I believe there was clear error in admitting the testimony if there is justication for doing so the court is at least required to show impartiality in other rulings. In this case every rule was broken in favor of the Bank and plaintiff was denied the right of fair trial to which she was entitled.

Prejudicial Testimony

Dr. Linda Carson

The stage was set for the Bank's unstated defense by Dr. Linda Carson, a psychologist who testified petitioner suffered from paranoid personality disorder. She based her diagnosis on one day of tests and interviews conducted more than five years after petitioner's discharge, on the review of deposition testimony and on short telephone conversations with coworkers and former employers from a list supplied by the Bank's atrorney.

She admitted on the stand that she had lied about the opinion of the psychiatrist who had treated petitioner some years ago for agoraphobia. She said variously she did not believe that a list supplied by the Bank would be biased and that even if she found the Bank had falsified its records her diagnosis would still be paranoia. The doctor said she would not have conclusively

reached this diagnosis without the phone interviews.

In response to an in limine motion the trial court had admitted the hearsay testimony on the condition the Bank establish that reliance on such testimony was the norm in this area. No such foundation was laid. The opinion of the District Court of Appeal only states other psychologists make phone calls and cites the judge's discretion, ignoring the requirement that discretion must be based on sound legal principles.

Maureen Koltugin

Dr. Carson's diagnosis, made a few months prior to trial, based on contemporaneous interviews and tests, claimed that petitioner was then unable to work in a group setting and "hadn't had a social life in years". The trial court disallowed the rebuttal testimony of Maureen Koltugin who had known petitioner favorably for several years in a neighborhood association and commun-

ity garden, on the ground the relationship was too far removed in time and a semi-social and business relationship could not be compared.

Employee Assistance Meeting

Though bigotry and intolerance were not part of Dr. Carson's diagnosis (presumably they are not inconsistent with paranoia though this question was not raised in the day and a half Dr. Carson testified), they were brought into the case by another exercise of the trial court's discretion.

The court had ruled *in limine* that inflamatory language purportedly used by petitioner during the meeting with Employee Assistance in September 1979 should be excluded because it had no bearing on petitioner's termination five months previously. The judge later reversed himself on the ground Gordon was present at the meeting which was held to consider petitioner's attempt to be reinstated (or rehired), that he was the ultimate decision maker and that

he had an open mind on the question of rehire.

The Bank alleges that during that meeting I said I classified people as "niggers, jews and queers" and that this was the reason I was not given my job back (or any of the other dozen or so for which I applied at the Bank).

The trap was a subtle but effective one. In response to Renzel's question at the meeting I did admit I categorize people as, presumably, does everyone else. Life would be very complex indeed unless we could mentally relegate people into the roles which give them significance in our minds - attorneys, AIDs victims, landlords, the homeless. This does not mean that we do so in a derogatory way, which is what the bank implies.

This is the single thread on which the Bank bases its decision not to rehire five months after termination and the main prop of its defense to an otherwise indefensible

claim of discrimination. Having a cause with emotional appeal apparently eliminates the necessity of dealing with the factual issues of the case.

The trial court admitted the testimony on the ground its probative value outweighed the prejudice to petitioner. It is not clear whether the District Court of Appeal concludes this holding was based on the premise Gordon was the ultimate decision maker and made the no rehire decision as the result of that meeting or the decision was made by Employee Assistance, which had promised employees they could use the service without retaliation (this latter promise was reiterated in the Code of Corporate Conduct, which the Bank conceded applied to Petitioner).

There is abundant testimony from Gordon that under no circumstances would he reinstate petitioner and from Renzel that Employee Assistance was the ultimate authority in employment decisions.

The allegation that I classified people is apparently probative in that it justifies the Bank's failure to rehire. This is difficult to reconcile with its alternate grounds that there were no positions available or that qualified candidates were found to fill the position I vacated or the other reasons given by the Bank.

There was no showing of harm caused by the purported language. Rothschild was not called as a witness; there was no testimony that he was aware of the remark I had made about gays prior to termination or that he or any other "minority group" felt affronted by anything I had ever said or done; there was testimony (unrebutted) that Rothschild and I got along well. And, as the Appellate Court noted during oral argument, there was no allegation of a slur against "niggers or jews".

When a trial court so blatantly disregards the rules of law as was the case here, a grave injustice is done to the judicial system and the concept of due process under the 14th Amendment becomes meaningless

The Fourteenth Amendment rights to a fair trial claimed to have been violated consist of various evidentiary rulings including errors involving discretion of the trial court, factual determinations and issues decided by the trial judge rather than given to the jury and an important federal rule of law which was disregarded. Petitioner has also claimed insufficient evidence to support the verdict and various errors in jury instructions, all contributing to an unfair trial in violation of due process.

Though I doubt that this question is one on which certiorari would be granted, it is relevant to the issues which I believe are, and is therefore set out.

Evidentiary Rulings

These are discussed in detail in

Appendix B, which was attached to my petition to the California Supreme Court to detail errors I felt were present in the appellate court's discussion of evidentiary rulings. To save duplication I incorporate Appendix B herein.

Factual and Legal Determinations

Factual determinations by the trial judge which should have been left to the jury included (1) I was not entitled to a leave under bank policies; (2) I could not have relied on the Employee Handbook; (3) Gordon while hourly should not be held to the standard of behavior of other employees; (4) Rex Halverson (a young, inexperienced attorney) was "obviously a superior employee - there was no discrimination there"; (5) there are two kinds of hourly employees - the list is a very long one.

Issues kept from the jury include determination of whether there was pattern and practice indicating discriminatory

intent in the Bank's use of the excuse of no positions available in termination of both Doreen and appellant and whether there was improper denial of appellant's rights under bank policies, depriving appellant of a chance to show bad faith.

Errors in jury instructions included failing to give proper instructions, including determination of the existence of a contract, the provision that "at will" employment applies for periods of 30 days or less and when good cause is required to terminate employment. Both improper and conflicting instructions were also included.

Best Evidence Rule

The trial court refused to abide by the best evidence rule, founded in Federal law. (Nourse v. Riddel, 143 F. Supp 759 and Clifton v. U. S., 4 How. 242).

Had objection under this rule been sustained it is doubtful that convincing evidence could have been presented that the employee handbook was first distributed

shortly before plaintiff's termination.

Since the handbook is the means by which the employee was advised of most of the promises made by the bank, the jury could easily have found, if it had been timely admitted, breach of the contractual provisions contained in it, of the covenant of good faith and fair dealing based on promises made in the handbook and of unequal treatment under bank policies, all contained in the book.

Unpublished Opinions

Opinions not certified for publication are not held to the same standards as published opinions since they cannot be cited as precedent; this can result in grave injustice to the litigant.

California Constitution, Article 6, section 14, provides in part:

> " . . . Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

California Rules of Court §976(b)(1) provides that no opinion of a court of appeal may be published in the official reports unless the opinion

> "(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in the published opinions, or modifies or criticizes, with reasons given, an existing rule . . ."

In this case the court's reading of McDonnell, supra, is a significant departure from any prior holdings of this court or any prior holdings of California courts. It would surely warrant publication as a new

rule of law under §976(b)(1) above, in view of the frequency with which McDonnell is cited. If, as we suspect, the author did not intend his interpretation of McDonnell to be put to a test he was assured of anonymity by simply failing to certify the opinion for publication.

To my petition to the California Supreme Court I appended an Outline of Evidentiary Rulings (attached hereto as Appendix B) in which I set out the fallacies I believed were contained in almost every area of the Opinion of the District Court of Appeal. Though it is not this Court's function to act in a supervisory capacity over state courts, I suggest that the apparent abuse of the provision of California law allowing unpublished opinions significantly erodes the judicial process. To the extent a litigant is deprived of a fair trial and appellate court review in violation of due process of law under the U. S. Constitution, the matter is of concern to this Court.

Following are some of the apparent contradictions in the opinion (the bracketed figures are page numbers):

There was evidence written policies were mere guidelines (17); plaintiff relied in promises contained in bank's manuals and policies (21).

Not rehired because no positions were available (17); decision not to rehire was fair (17).

Renzel's job was to see employees were treated fairly, which she said was in accordance with bank policies; not all bank policies applied to the tax department, including equal employment opportunity, promotion from within, that separations be carried out fairly. (18)

Agreement of Employment supports a finding of at will employment under Labor Code 2922 (which limits at will employment to 30 days or less) (16).

Dr. Carson's hearsay testimony admissible to show paranoid personality disorder (6);

Maureen Koltugin testimony re observation of plaintiff too far removed from issues of case (12).

Plaintiff was allowed to present testimony of unequal treatment (13); sufficient evidence to find no breach of contract or covenant of good faith (16); substantial evidence of no discrimination or breach of contract or covenant of good faith (18).

This Court has held that

> "It is well settled that, where two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court, and each is of equal validity. . . Union Pac. Ry. Co. v. Mason City & Ft. D. R. Co., 199 U.S. 160, 26 S.Ct. 19, 50 L.Ed 134." Bank of Italy Nat. Trust & Savings Ass'n v. Bentley (1933) 18 P.2d 939, 217 C. 320.

Here we have so many conflicting conclusions drawn by the District Court of Appeal that it would be safe to assume the jury was also unable to reach a verdict on

any logical basis.

Apart from the evident misinterpretation of the McDonnell cases, supra, there is little wonder that the author of the apparently irreconcilable statements above would not want his opinion subjected to the scrutiny which would result from publication.

Forum

> Litigants are deprived of a forum in which issues can be resolved when an appellate court opinion is contradictory, does not address key issues and is allowed to go unchallenged through nonpublication

> " . . . a statutory provision precluding all judicial review of constitutional issues . . . deprives an individual of an independent forum for an adjudication of a claim of constitutional right." (Bartlett v. Bowen, 816 F.2d 695, 703.)

Here, by the expedient of an unpublished opinion the state appellate court assures that its reasoning will not be closely examined and that it will not be used as precedent.

The litigant is thus left with no forum in which an unreasoned opinion can be challenged, in clear violation of his due process rights.

Qualifications Under McDonnell Douglas

Widespread litigation regarding employment discrimination makes development of a uniform body of law highly desirable

In response to a note from the jury asking for

> "a list of items plaintiff needs to prove to show discrimination existed"

the court gave the McDonnell-Douglas instruction to which was appended the following:

> " . . . Defendant only needs to show that the employees were qualified to perform the duties of the open positions . . . "

(This instruction is reproduced in its entirety at pages 19 and 20 of the Opinion, Appendix 1.)

Assuming for the moment that a burden of proof instruction was responsive to an inquity of what must be proved, the implication was that hiring a qualified employee was a complete defense to a charge of discrimination. This does not seem to have been the ruling of the courts in cases under McDonnell-Douglas.

The criteria developed under these cases are set out under Statement of the Case, supra, at page 17. In discussing the qualifications needed to establish a prima facie case of discrimination, McDonnell Douglas v. Green, supra uses the language

> ". . . employer continued to seek applicants from persons of complainant's qualifications" at 411 U. S. 792, 802.

Texas Dept. of Community Affairs v. Burdine, 450 U. S. 248, 259 states

> ". . . the employer has the discretion to choose among equally qualified candidates . . ." (emphasis added)

The relative qualification of one hired to replace a litigant in an employment discrimination case is frequently a key question in the outcome of the case, as it was here. Though nonresponsive to the jury's question, this instruction apparently contributed heavily to the verdict.

To the extent that any question remains, as apparently it does in the mind of the author of the opinion in this case, this

Court's ruling on this important body of law should clarify whether the hiring of a "qualified" (or less qualified) applicant is sufficient to defeat a claim of discrimination by one who is discharged from or denied a position for which he is equally or more qualified.

If the question is indeed an open one a decision by this Court would save needless litigation. If the matter is considered to have been resolved, allowing courts to deprive litigants of their right to rely on continuity of decisions not only erodes the court system but is a clear violation of the right of a fair trial under the due process provisions of the Constitution.

Certiorari should also be granted on this ground since the appellate court and trial court relied on a federal case and failed to follow the mandate of the Supreme Court in a state law holding.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Petitioner in Pro Se

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

FILED

Nov. 03 1988

Court of Appeal
First App. Dist.

RON D. BARROW

By_____
Deputy

JOAN DANIELSON,

Plaintiff and Appellant,

v.

BANK OF AMERICA, NT & SA et al.,

Defendants and Respondents.

_____/

A031374

(San Francisco County
Super. Ct. No. 771023)

APPENDIX A

Plaintiff Joan Danielson appeals from a judgment in favor of the Bank of America entered after a jury trial. Plaintiff brought this action against the bank alleging discrimination against her based upon her age and her sex, for breach of her employment agreement and breach of the bank's duty of good faith and fair dealing. She sought compensatory and punitive damages. We affirm the judgment.

Plaintiff was hired by the bank as an hourly employee on March 28, 1978. At the time she was hired, she was 48 years old and had a masters degree in business administration, but no law degree. She was hired as a tax preparer in the International Services Section of the bank's tax department. This section, known as I.S.S., prepared tax returns for the bank's expatriates. At the time plaintiff was hired, all the

employees in the I.S.S. were hourly employees, other than Robert Gordon, the tax attorney who supervised the department. In June 1978, Gordon received permission to change some positions in his section to salaried positions. He told the persons hired in March 1978 that the department was becoming "more permanent." [1

Gordon told plaintiff, when she was hired, that she would receive overtime pay for overtime work and that the position was temporary. At the time plaintiff was hired, Gordon had already made the decision as to who would be given the seven salaried positions the department had been given. There were no other salaried positions available when plaintiff was hired.

In August 1978, another salaried position became available when the bank was considering expanding the I.S.S. services to include pension liaison with its trust department. Robert Chinen, an experienced

pension consultant, was hired to fill the position. No then employee in I.S.S. was considered for this position because of lack of pension experience. Gordon testified that plaintiff's age or sex had nothing to do with her not being given this job.

In February 1979,,when plaintiff and Rex Halverson were the only two hourly employees remaining in I.S.S., one more salaried position became available. This position was filled by Rex Halverson. Halverson had been hired one week before plaintiff. Gordon testified Halverson was selected for the position because his skills and training as an attorney made him a more versatile employee. Plaintiff was not given the job because Gordon believed she was having difficulty getting along with her co-workers which impacted her performance.

In March 1979, Gordon began a new system for reviewing work of hourly and salaried [2

tax return preparers. Within the I.S.S. there were three tax reviewers who were independent contractors. Under the old system, plaintiff's work was reviewed by Hari Garwahl. Under the new plan, her work would be reviewed by whichever reviewer was available, including Michael Rothschild.

Plaintiff was informed of the new procedure by Michael Lane, assistant manager of I.S.S., at a meeting with Lane and Jim Fox, a co-worker. She became quite upset and declared "I am sorry, I just can't work with a homosexual, I don't like queers and I won't work with Rothschild." Shortly thereafter, Lane assigned one of plaintiff's files to Rothschild for review. Plaintiff said she would rather not work with Rothschild. She claimed Gahrwal was her reviewer. Of Rothschidl she said, "He's totally and absolutely incompetent." She suggested Rothschild should be reviewing less diffidult returns which were prepared by less

experienced tax return preparers. Lane told her she had to work with all the reviewers. She replied, "I will think about it." Lane reported this incident to Gordon who told Lane the plaintiff's behavior was unacceptable. Gordon instructed Lane to counsel plaintiff about her conduct.

On April 3, 1979, Lane counseled plaintiff by again reviewing the rationale for the new system of review and emphasizing the need for her cooperation and compliance. He told her that her refusal to work with Rothschild constituted insubordination and asked her to reconsider her decision.[1] [3] Plaintiff again refused to work with Rothschild, calling him "totally incompetent" and a "nincompoop."

Lane informed Gordon of plaintiff's behavior and comments during the counseling session. Based upon this report, Gordon decided to terminate plaintiff's employment.

Prior to meeting with plaintiff to tell

her his decision, Gordon learned from Lane, for the first time, that plaintiff was going to have cancer surgery the next day. Gordon testified that out of compassion for her medical condition, he felt he could not terminate her employment at that time. He called plaintiff into his office and tried to convince her to reconsider her refusal to work with Rothschild.

During the meeting, plaintiff asked about a performance evaluation and a raise. Gordon replied they were talking about whether or not she would continue to work at the bank, not whether she would receive a raise. Plaintiff renewed her attack on Rothschild, again calling him a "queer" in front of Gordon. The meeting ended with them agreeing that plaintiff would think over whether she would work with Rothschild and she would let Gordon know her decision the next morning.

The next morning, on April 4, 1979, before the meeting with plaintiff, Gordon checked with the employee assistance departemnt and confirmed the bank's policy that hourly employees were not entitled to medical leaves of absence. At the meeting with Gordon, plaintiff told him she would work with Rothschild. Gordon told her the bank's policy was that there was no medical leave [4] for hourly employees and that there "was absolutely no guarantee that there would be a position available for her if and when she should ever happen to reapply." Gordon testified he did not say anything to plaintiff about holding her job open for her. He explained the department was going into its busiest time and applicants were responding to ads he had put out so that the jobs might be filled. He said that if she reapplied, then all her qualifications would be considered again. They also discussed the "time frame of her absence from the department."

Gordon testified that had plaintiff not been going to have surgery, he would have terminated her at this meeting.

Before the end of April 1979, three new employees were hired into the department, two to fill the extra slots needed for the tax season and one to replace plaintiff. At the end of April, when plaintiff informed Gordon she was available to return to her work, she was advised no position was available for her.

Plaintiff then asked to meet with a bank officer in the Employee Assistance Department in order to seek reconsideration of the decision not to rehire her. The officer determined there was no discrimination. Plaintiff then took her complaint to the director of personnel for the bank, Jennifer Renzel. Renzel set up a meeting with the employee assistance officer, Gordon, plaintiff and herself.

At this September 1979 meeting, they discussed plaintiff's refusal to work with

Rothschild. Plaintiff repeated he was a [5]
"nincompoop" and a "queer." Renzel testified that plaintiff said she tended to categorize people as "jews and niggers and queers" because it enabled her to better understand them. They discussed plaintiff's relations with people in I.S.S. and plaintiff made other derogatory remarks about other employees. After the meeting, bank personnel looked into plaintiff's assertion other hourly employees had received leaves of absence. The bank personnel determined plaintiff was not discriminated against and there were no grounds for reversing the decision not to rehire her; Renzel so informed plaintiff.

On appeal, plaintiff claims the trial court erred in several of its evidentiary rulings; there was not substantial evidence to support the jury's verdict against her breach of contract claim; and the court erred in instructing the jury. The bank asserts that plaintiff's claims are without merit and also, with respect to the court's evi-

dentiary rulings, contends that even if there was some error, none was reversible error. (Rodriquez v. McDonnell Douglas Corp. (1978) 87 Cal.App.3d 626, 649.)

Plaintiff asserts it was prejudicial error for the trial court to refuse to exclude hearsay testimony of Dr. Linda Carson, a clinical psychologist, who testified regarding her diagnosis of plaintiff as having a paranoid personality disorder. Dr. Carson based this diagnosis on tests she administered to plaintiff, an interview session with plaintiff, a review of plaintiff's deposition testimony and telephone conversations with plaintiff's former co-workers and past employers.[1] The list of co-workers was provided to her by the bank's attorney. In response to an in limine motion to exclude the evidence of the telephone conversations, the court ruled she could give her conclusions based upon the telephone interviews, but could not testify to the hearsay individual conversations, provided the

bank first established that "psychologists in this area acting within the standard rely upon statements made over the telephone from people they call from a list supplied by one party."

Under Evidence Code section 801, the use of hearsay evidence by a psychologist in the formation of an expert opinion is permissible provided the evidence is the type of evidence that may reasonably be relief upon by such an exeprt. The trial judge has wide discretion to admit or reject such evidence. The issue must be decided on a case by case basis. (1 Witkin, Cal. Evidence (3d ed. 1986) The Opinion Rule, § 477, pp. 448-449; West v. Johnson & Johnson Products, Inc. (1985), 174 Cal.App.3d 831, 861.) Here, Dr. Carson testified it was her practice and the standard of practice of psychologists in the bay area to telephone other persons and converse with them concerning how a person was functioning at a certain time when the expert is asked to

do a retrospective examination fo someone. We find no error.

Plaintiff also claims it was prejudial error for the court to refuse to show to the jury the pictures Dr. Carson had used in administering the Thematic Apperception Test to plaintiff. In this test the psy- [7] chologist shows the patient a number of cards with pictures on them and the patient describes what she sees in the pictures. The cards were not identified as an exhibit or admitted into evidence during trial. During plaintiff's counsel's cross-examination of Dr. Carson, both Dr. Carson and the bank's counsel complained that plaintiff's counsel was handling the cards in a manner so that they could be seen by the jury. The record contains no request to show the cards to the jury and no ruling on the issue by the court. The record does reveal a conference at the side bar among counsel and the court at the time of the complaints that the jury could

see the cards but that conference was not reported. The state of the record is such that the issue is not properly before this court.

Plaintiff also urges that the testimony regarding her remarks that she classified people as "niggers, Jews and queers," made during meetings with employee assistance personnel, should have been excluded as irrelevant. Plaintiff asserts several grounds for this contention: (1) if the employee assistance group were the ultimate decision maker as to whether plaintiff would be rehired, then the bank had promised employees they could use the service without retaliation; (2) if Gordon were the decision maker, then the decision was made long before the meetigg with the employee assistance group and anything occurring during that meeting would be irrelevant; and (3) the statements attributed to plaintiff, which she denies making, [8] were rpejudicial, highly inflammatory, and calculated to inflame the jury.

The fact that plaintiff denies making this statement does not make it irrelevant. Evidence which tends to contradict an assertion of a party is relevant evidence. (3 Witkin, op. cit. supra, § 1891, pp. 1937-1939.) This testimony was relevant to the issue of whether the bank discriminated against plaintiff by refusing to rehire her. Gordon testified he decided not to rehire her based in part on her comments at this meeting. Furthermore, this evidence is not made inadmissible by the bank's code of conduct which promised employees they might discuss their standards which differ from those of the bank with their supervisors or employee relations personnel without fear of reprisal. Plaintiff's alleged statement concerned her attitude toward co-workers rather than policies of the bank or her supervisor. The purpose of the meeting was to decide if she should be rehired and her statements during the meeting concerning her ability to work with others were relevant to that

issue. The court did not err in determining the probative value of the evidence outweighed the prejudice to plaintiff. (1 Witkin op. cit. supra, § 298, pp. 268-270, § 309, pp. 278-280.)

Plaintiff called Doreen Blumenfeld as a witness. Blumenfeld was hired by the bank in the I.S.S. in March 1977. She testified to the "fraternity-like" atmosphere in the section, the sexist comments, the disparate treatment of older and female employees in the section and appellant's good performance [9] and demeanor at work. Prior to trial, the court had granted the bank's in limine motion to exclude testimony by Blumenfeld that she had filed an action against the bank charging discrimination and wrongful discharge which the parties had settled. The court also ruled there would be no mention of a special relationship between Gordon and a secretary in the section. Although she had been told by plaintiff's counsel that she could not mention these

topics, Blumenfeld disobeyed the court order and volunteered the information during her cross-examination by counsel for the bank. The bank moved for a mistrial; the court denied the mtoion and ordered the offending testimony stricken. The court also agreed to admonish the jury telling them of the court's prior ruling and Blumenfeld's knowing violation of the order.

Plaintiff's argument is hard to follow on this issue. First, she states the testimony was elicited by the bank and any harm could have been cured by a timely admonishment. She then claims the admonishment which was given was prejudicial to plaintiff in that it went beyond the court's order and instructed the jury to irnore all of Blumenfeld's testimony about acts of discrimination and it left the jury with the implication that plaintiff was responsible for introduction of the forbidden testimony. Plaintiff relies on two sentences contained in the admonishment to support her interpre-

tation and states she believes the jury also understood it was to disregard virtually all Blumenfeld's testimony. The court stated: [10] "The court also ruled that Miss Blumenfeld couldn't herself testify as to whether she was terminated by the bank or that she was otherwise discriminated against by the Bank of America." The court then said: "The court feels constrained to tell you about my instructions to her, the fact that they were violated, and to further admonish you that you are not to consider that testimony for any reason or to discuss it at all." While these two sentences taken alone might support plaintiff's interpretation, they are taken out of context. The court told the jury the reasons why it could not consider testimony about settlement of the lawsuit. The court explained the jurors did not know the settlement terms and they might draw the wrong conclusion from the settlement and that public policy encouraged

settlement of lawsuits. We believe the admonition accurately reflected the court's order. Plaintiff has offered no juror affidavit supporting her belief that the jury misinterpreted the admonition nor did her counsel raise the possible ambiguity in the trial court. We find no error.

Next, plaintiff complains that the court should not have excluded testimony of Maureen Koltugen as a rebuttal witness. In an offer of proof, plaintiff stated Koltugen would testify that she had known plaintiff from 1982 through 1985 in a social capacity and was aware of her reputation for being "easy to get along with and working with people." The court ruled the testimony irrelevant on the grounds the observation of plaintiff was during a period three years after her employment with the bank ended and the observations pertained only to plaintiff's conduct outside the work place [1] in the "relaxed atmosphere of community work and neighborhood meetings." "Evidence rele-

vant only indirectly, and so far removed from the fact in issue as to render its probative value slight and its usefulness in the case practically nil, may be excluded. Whether "collateral" and "remote" are distinct or related concepts, the judge's discretion to apply them in the interests of expedition of the trial is clear, and in a few situations positive rules of exclusion have developed." (1 Witkin, op. cit. supra, § 306 pp. 276-277.)

Prior to trial, the bank made a motion for summary judgment or, in the alternative, for summary adjudication of issues. The motion for summary judgment was denied; the court granted summary adjudication of certain issues. Among those granted was issue number 15 which provides: "Bank policy provides that hourly employees are not entitled to paid vacation time or medical leaves of absence with a guaranteed right to return to work." Based upon this ruling, the trial court excluded any evidence of

plaintiff's entitlement to time off for medical reasons with a guaranteed right of return to her job. Plaintiff claims this ruling was in error because the court did not allow her to present evidence of disparate treatment in denying plaintiff a leave of absence and evidence that she was improperly denied leave under the bank's policies and thus the ruling deprived her of the right to show the bank's bad faith. She contends the ruling also deprived her [12] of the opportunity to show a pattern and practice of discrimination against women.

The trial court properly excluded evidence that plaintiff, as an hourly employee, had a guaranteed right under bank policy to return to work after being absent for medical reasons. Code of Civil Procedure section 437c, subdivision (f), provides that when an issue has been determined by the court to be without substantial controversy, then "[a]t the trial of the action the issue so specified shall be deemed

established and the action shall proceed as to the issues remaining." Also, contrary to plaintiff's assertion, she was allowed to present evidence of unequal treatment. She presented testimony that other hourly employees in I.S.S. were reinstated after taking time off for personal reasons. We find no error.[1]

Plaintiff also maintains the court erred by failing to sustain her objection to testimony of the custodian of records of the bank based upon the best evidence rule. The custodian of records testified that the employee manual which contained promises upon which plaintiff testified she

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[1] Plaintiff in several instances has introduced new issues in her reply brief. For example, on the issue of disparity of treatment she, for the first time in her reply brief, complains that the trial court erroneously excluded time sheets of employees in I.S.S. These issues will not be addressed. "New matter cannot be raised for the first time in a reply brief." (Nelson v. Gaunt (1981) 125 Cal.App.3d 623, 641.)

relied was not issued until January 1979. Plaintiff was hired in March 1978. Plaintiff's counsel objected on the grounds of the best evidence rule and said if there were a document that showed when the employee handbook was first given to bank employees, then he would like the document put in evidence. Although the court overruled the objection, the bank then introduced a circular showing the book was distributed to employees in January 1979. Plaintiff admits the manual was admitted into evidence on the last day of trial after all testimony had been given but she claims she was prejudiced because the admission of the manual was not called to the attention of the jury. She is not correct. In closing argument, her counsel called attention to the manual, told the jury it was in evidence adn requested that they review it. We find no prejudice to plaintiff. [13]

In a related argument plaintiff asserts the court erred in excluding the bank's personnel manuals and written policies. She points particularly to the court's refusal to admit the Standard Procedures Manual which she claims contains most of the bank's promises to its employees. Plaintiff's argument is factually incorrect. There was uncontradicted evidence presented at trial that portions of the bank's policies did not apply to hourly employees and specifically that portions of the Standard Procedures Manual did not apply to personnel in the bank's tax department. The court ruled it would admit the manuals and policies, including the Standard Procedures Manual, identified as exhibit 90, provided that plaintiff's counsel excised the portions of the exhibit identified in testimony as not applying to hourly employees. The court said it would admit all policies and manuals that bank personnel testified did apply to hourly employees and all portions [14

that could or could not apply to hourly employees. Plaintiff's counsel agreed he would attempt to edit the exhibit. The record shows the exhibit was not admitted, we can only presume an edited version was not presented to the court. Again we find no error.

Plaintiff next contends there was not sufficient evidence to support the jury's finding that there was no breach of contract and no breach of the covenant of good faith and fair dealing by the bank. We begin by setting forth our standard of review on this issue. "The principles of review which must guide us are elementary. As we said over four decades ago in Crawford v. Southern Pacific Co. (1935) 3 Cal.2d 427, 429, a 'reviewing court is without power to substitute its deductions for those of the trial court.' More recently Nestle v. City of Santa Monica (1972) 6 Cal.App.3d 920, 925-926, emphasized that 'In resolving the issue of the sufficiency of the evidence,

we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment . . . " (Campbell v. Southern Pacific Co. (1978) 22 Cal.3d 51, 60.) "In brief, the appellate court ordinarily looks only at the evidence supporting the successful party, and disregards the contrary showing. 'Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorabel discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.' (Estate of Teel (1944) 24 Cal. 2d 520, 527 . . . " (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 282, pp. 293-294; emphasis in original.) [15]

There was sufficient evidence introduced to support the jury's finding of no breach

of the employment contract. When she was hired, plaintiff signed an Agreement of Employment. This agreement provides in paragraph number nine: "It is understood that if I am employed on an hourly basis, the provisions of paragraphs 5, 6, 7, and 8 do not apply and that my employment may be terminated by me or the employer without notice." (Emphasis added.) This contract alone is sufficient evidence to support a finding by the jury that plaintiff was an at will employee as defined in Labor Code section 2922.[2] There was additional evidence that plaintiff herself understood that as an hourly employee she was not entitled to reinstatement after her leave for surgery.

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[2] Labor Code section 2922 reads: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

The issue of which provisions of various employee manuals and written procedures and policies applied to hourly employees such as plaintiff and which did not was contested at trial. The bank offered evi- [16]
dence the manuals and written policies were guidelines to be used by management employees. Plaintiff asserted they were promises breached by the bank. Specifically, plaintiff asserts breaches of the following bank policies were established; the policy of promoting from within the bank; the policy that separations be carried out fairly; the policy that managers have discretion to grant some hourly employees a leave of absence; the righ to use employee assistance and the right to counseling and to an annual performance review.

The promotion complaint refers to the hiring of a person with pension experience from the outside directly into a salaried position. The bank offered testimony that Gordon wanted to establish a new relation-

ship between his departemnt and teh bank's trust department. The plan had been for the new employee, who had been a pension consultant, to do pension and estate work but the plan did not work out. The bank presented evidence that plaintiff herself understood when she left employment that she had no right to reinstatement and that Gordon had also told her this. It was uncontested that plaintiff was counseled two times about her inability to get along with other employees and her refusal to have her work reviewed by Rothschild. The jury heard that plaintiff did complain to the employee assistance department and, after investigation, it was determined that the decision not to rehire plaintiff was a fair decision. Testimony was also given that plaintiff left for surgery in [17] the middle of the busy tax season and the bank found a qualified person to fill her position.

Jennifer Renzel who was director of employee relations for the bank and later was director of management and employment for the bank testified at length about the personnel policies and procedures of the bank. She was also involved in establishint the first equal employment opportunity section in the bank. She said it was part of her job to see employees were treated fairly which she described as in accordance with bank policies. She pointed out, however, that not all bank policies applied to the bank's tax department. Policies that do not apply to all employees are that the bank will provide equal employment opportunity for all, that the bank has a general policy, rather than a promise, to promote from within the bank, and that separations are to be carried out fairly. Renzel also testified plaintiff admitted in a meeting with Renzel and others that she had referred to Rothschild as "queer." After investigation, Renzel said she determined

plaintiff had not been discriminated against and the decision not to rehire plaintiff was fair. The bank also offered testimony that plaintiff was not rehired because no position was available for her when she was ready to work. Gordon testified he was rpeparing a review for plaintiff had she continued with the bank after her surgery. In short, there was substantial evidence from which the jury could determine the bank had not discriminated against plaintiff or breached any employment agreement or promise made to her. [1]

Lastly, plaintiff claims errors in jury instructions. First, plaintiff complains of the instruction given to the jury in response to a question from the jury which she claims was nonresponsive and misleading. The jury asked for "a list of items plaintiff needs to prove to show discrimination existed." The court gave them the instruction on the burden of proof of

each party with respect to the issue of discrimination[3] as set forth in the margin. Plaintiff does not explain why the [19]

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[3] The following instructions were given by the court in response to the question of the jury:

"With regard to plaintiff's claim that she was not hired as a salaried employee, rehired, received a lesser rate of pay than co-workers, or not granted a leave of absence because of her age and/or sex, initially plaintiff must prove, by a preponderance of the evidence that:

"1. Plaintiff belongs to a protected group;

"2. Plaintiff was available and applied for an open position;

"3. Plaintiff was qualified for the open position;

"4. Despite her qualifications, plaintiff was rejected; and

"5. Plaintiff suffered damages due to the discrimination.

"If the plaintiff satisfies you on each element of this initial burden of proof, then defendant must only present a legitimate, non-discriminatory reason for their actions.

"Once Defendant presents a legitimate, non-discriminatory reason for its decision, plaintiff has the burden of proving by a preponderance of the evidence that:

"1. The reason offered by the defendant is false or is offered to conceal the true reason;

"2. Plaintiff must do this by persuading you that

"(A) Discriminatory reasons actually motivated defendant, or

instruction was not responsive to the question. We believe it was responsive. Also, the record shows the jury made no further inquiry.

(Footnote continued from previous page.)

"(B) That defendant's explanation is unworthy of belief, and a pretext.

"Plaintiff's suspicion of improper or discriminatory motive based on conjecture or speculation is not sufficient.

"By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue preponderates, then your finding upon that issue must be against the party who had the burden of proving it.

"In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon that issue regardless of who produced it.

"Testimony has shown employees were hired into hourly and salaried positions before and after plaintiff's separation from the bank. Defendant does not have to show that the employees were more qualified than plaintiff. Defednant only needs to show that the employees were qualified to perform the duties of the open positions and that the decision was not based on unlawful discriminatory criteria."

Plaintiff also incorrectly states the instruction was legally erroneous because it stated the bank need only show the person hired to replace plaintiff was qualified for the job, as opposed to "as qualified as plaintiff for the job." The instruction tracks the burden of proof language appearing in McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802-803. Thatmodel does not measure qualifications relative to other applicants; it speaks in terms of whether the applicant is qualified for the position.

Plaintiff maintains the court erred in not giving certain instructions proposed by plaintiff. We find no error. Plaintiff's instruction 11 states in summary that an employee who gives up other employment to take a job "suffers a prejudice which may oblige the employer to abide by the promises made which induced the employee to so act. Plaintiff offered no evidence the bank

made any promise to her to induce her to give up other employment. Plaintiff, instead, relied on promises contained in the bank's manuals and policies. The bank's duty with regard to its policies and manuals was adequately covered in instruction 56. [20]

Plaintiff's proposed instruction 18 defined at-will employment contracts and listed principles limiting the right to discharge. These concepts were adequately covered by instructions 26, 51, 52 and 56. Plaintiff's proposed instruction 19 dealt with the factors used to determine the existence of an implied-in-fact contract which was adequately covered in instruction 56. Plaintiff's proposed instruction 20 defined when the employer's policies, manuals and other such writings become part of the employment contract. This topic was covered by instructions 28, 52 and 56. Plaintiff±s proferred instructions 21, 22, and 23 all deal with when good cause is required to terminate

an employee. The subject was correctly covered by instructions 51, 52 and 56. A trial court may properly refuse a party's instruction if the contents of the instruction is covered by other instructions given. (Levy-Zenter Co. v. Southern Pac. Transportion Co. (1977) 74 Cal.App.3d 762, 782.)

Plaintiff claims the court erred in not giving her proposed instruction on the factors used to determine a discriminatory motive by an employer. Plaintiff admits the record does not contain her proposed instruction. The matter cannot be reviewed.

Plaintiff also challenges the portion of instruction 21 given by the court which [21] states that in order to prove a breach of the covenant of good faith and fair dealing, she must show that the udnerlying contract was breached. This is a correct statement of the law. (Heimadi v. AMFAC, Inc. (1988) 202 Cal.App.3d 525, 548; Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal.App.

3d 299, 320.)

The judgment is affirmed.

Benson, J.

WE CONCUR:

Kline, P.J.

Smith, J.

[22]

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 2

No. Ao31374

S008243

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

DANIELSON

v.

BANK OF AMERICA N.T. & S.A. et al.

LUCAS, C. J. AND PANELLI, J., DID NOT PARTICIPATE

Appellant's pettiion for review DENIED.

s/Brennan
Acting Chief Justice

SUPREME COURT
FILED
Jan 19, 1989

APPENDIX 1A

APPENDIX B

OUTLINE OF EVIDENTIARY RULINGS

This material is a verbatim copy of pages 15-21 of petitioner's

PETITION FOR REVJEW
OF DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION TWO

No. A031374

which was filed December 12, 1988

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

No. S008243

OUTLINE OF EVIDENTIARY RULINGS

APPENDIX B

DR. CARSON

Objection: Refusal of the trial court to exclude hearsay testimony regarding phone conversations which the psychologist states were an essential element in her finding of paranoid personality disorder where the court had ruled proper foundation must be laid; also failure to instruct the jury regarding hearsay.

Opinion: Admissible under Evidence Code 801. Court has wide discretion.

Fallacies:

1. The Opinion does not claim that other psychologists relied on telephone conversations with other persons in forming their diagnoses, as required by the *in limine* ruling, only that they made them.
2. The Opinion does not address the issue of bias in the persons interviewed - since the list was supplied by one side.

3. The Opinion ignores the issue of Dr. Carson's credibility:

a) She denies prior contact with the Bank but says she places complete credence on their representation the list is unbiased.

b) Dr. Carson testified she would not change her diagnosis of paranoid personality disorder if she found the Bank had in fact altered its records.

c) She admits in court that she had lied about the contrary opinion of Dr. Anderson.

4. The Opinion ignores misrepresentations by Respondent:

a) That Dr. Nievod had made phone calls on which he had relied.

b) That Appellant failed to call witnesses who would have supported an opposing view (the court rejected the rebuttal testimony of Maureeen Koltugin).

c) Hearsay witnesses could have been challenged (though four of those inter-

viewed by phone were called as witnesses by Respondent, none testified regarding conversations with Dr. Carson.)

DOREEN BLUMENFELD

Objection: Admonition to jury not in conformity with in limine ruling and not timely.

Opinion: Admonition accurately reflected trial court's Order. Plaintiff's attorney raised no objection to its form in the trial court. While the admotion told jury not to consider testimony re discrimination or termination this was taken out of context. Appellant's argument is hard to follow, since she claims the testimony was elicited by the bank and could have been cured by a timely admonition, then objects to form of admonition.

Fallacies:

1. Does not address the issue of timeliness - the Court allowed 100+ pages of testimony then based its admonition on statements made at very beginning of testimony.

2. Objection to form of admonition was made by plaintiff's attorney and lodged with the trial court; this was called to the appellate court's attention, with citation to the record.

3. The admonition clearly tells the jury to disregard testimony regarding discrimination against Doreen; this testimony had been elicited entirely on cross-examination by Respondent's attorney.

4. There is no argument by Respondent nor claim by the Appellate Court that the testimony was not elicited by the Bank's attorney, nor justification for disallowing testimony brought out on cross-examination.

5. The admonition clearly does not reflect the ruling on the limine motion, since it told the jury to disregard testimony re discrimination and termination, which are not mentioned in that ruling.

EMPLOYEE ASSISTANCE MEETING

Objection: Introduction of testimony regarding inflamatory language of little probative value.

See discussion at page 1-4. –

MAUREEN KOLTUGIN

Objection: Trial court should not have excluded her testimony as a rebuttal witness.

Opinion: Trial court excluded testimony as irrelevant because the witness's observation was three years after employment ended and in the relaxed atmosphere of community work.

The judge had discretion to exclude it since it was so far removed from the issues of the case as to render its probative value slight.

Fallacies:

1. Dr. Carson had based her finding of paranoia on tests conducted two years after Appell- and met Maureen and hearsay testimony from witnesses also interviewed two years

later. She said she had interviewed employers since termination.

2. Dr. Carson said Appellant was currently unable to function normally in a social or business situation and "hadn't had a social life in years".

LEAVES

Objection: The trial court excluded any evidence of Appellant's right to take time off for medical reasons.

Opinion: Trial court properly excluded evidence that I had a guaranteed right to return under bank policy, basing its ruling on a finding by Judge Brown and citing CCP 437c(f).

Fallacies:

1. Judge Ertola's ruling was not consistent with Judge Brown's finding:

> "Hourly employees are not entitled to paid vacation time or medical leaves of absence with a guaranteed right of return to work." (Judge Brown's finding)

"We are not going to allow testimony regarding plaintiff's entitlement to time off for medical reasons". (Judge Ertola's ruling at RT 740:3-5)

2. It was erroneous for the Appellate Court to justify Brown's ruling under CCP 437c(f), which excludes testimony on a matter that has been determined as without substantial controversy.

3. Exclusion of testimony regarding entitlement to leaves for medical purposes does not address the issue raised of improper denial of leave under the bank's policies and opportunity to show bad faith.

4. It also does not address the issue of pattern and practice, a means of showing discriminatory intent under McDonald v. Green (1973), 411 U.S. 792.

5. The appellate court does concede that there was evidence of unequal treatment.

EMPLOYEE HANDBOOK

Objections: Failure to sustain objection based on Best Evidence Rule (to custodian's

statement that the handbook was not issued until shortly before I left the bank.)

The handbook was introduced after all testimony was given and not called to the jury's attention.

Opinion: The Bank introduced a circular showing a 1/79 distribution date.

In closing argument Appellant's attorney told the jury the handbook was in evidence.

Fallacies:

1. My objection under the Best Evidence Rule is not addressed. There is no attempt to say the circular which was introduced was the best available evidence.
2. The court does not respond to my claim of prejudice in allowing the jury to question my credibility because I had incorrectly claimed reliance on the handbook.
3. My attorney did not tell the jury the document was in evidence. The court apparently is erroneously referring to RT 2112:14, where my attorney refers to the Employee

Benefits manual.

PERSONNEL MANUALS

Objection: The Court erred in excluding personnel manuals.

Opinion: Plaintiff's argument is factually incorrect. (It does not specify in what way.)

There was uncontradicted evidence that portions of the Standard Procedures Manual did not apply to the tax department.

The court ruled it would admit edited manuals, and the Appellate Court assumes an edited version was not submitted. Therefore there was no error.

Fallacies:

The Appellate Court does not address:

1. Discrepancy between the trial court's admission of other manuals not exclusively related to hourly employees and its refusal to admit unedited SPMs.
2. Contention that Appellant had rights under the Bank's policies and was entitled to

the benefit of rules and regulations adopted for her protection.

3. Repeated refusal to admit the document in the jury's presence led them to believe it was inapplicable.

The claim of the appellate court that evidence was presented that portions of the SPM did not apply to the tax department is incorrect.

APPENDIX B